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No. 82-1540

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LARRY WILLIAMS,

Petitioner,

vs.

JAMES PASMA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF MONTANA

BRIEF FOR THE RESPONDENT IN OPPOSITION TO THE PETITION

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QUESTIONS PRESENTED

Whether this Court should grant a Writ of Certiorari when the Petitioner claims that the Montana trial and appellate courts erred:

(1) In determining that the Petitioner was a public figure within the meaning of the First Amendment to the U.S. Constitution, and in applying the constitutional privilege to a statement "unrelated to a public controversy or public affairs,"

(2) In holding there was no factual basis upon which a jury could conclude the alleged libelous statements were made with "actual malice," and

(3) In applying the First Amendment privilege to a "non-media" Defendant.

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OPINIONS BELOW

The opinion of the Montana Supreme Court affirming the trial court's summary judgment is reported at 39 St. Rpt. 2332, 656 P.2d 212, and is attached as an Appendix to the Petition for Certiorari commencing at page A-1. The trial court opinion granting summary judgment is found beginning at page A-24 of the same Appendix.

JURISDICTION

The decision of the Supreme Court of Montana was entered on December 29, 1982. The jurisdiction of this Court is properly invoked under 28 U.S.C. Section 1257(3).

STATEMENT OF THE CASE

The factual framework within which this case was resolved by the Montana courts is most concisely stated in the trial court's Findings of Fact

No. 6 through 11, pages A-28 through A-31 of Petitioner's Appendix. In summary, the Montana courts concluded Petitioner was a public figure on the basis that during the twenty months prior to the alleged libel, the Petitioner actively sought the United States Senate seat from Montana, securing the Republican nomination for the position, was an active member of the Republican party, a representative in Montana of the National Taxpayers Union, an active member and leader of a political organization promoting the Republican nomination of John Connally for President of the United States, a promoter of an initiative to be placed on the public ballot and throughout that time prominently, publicly and actively injected himself into general public discussions of political and controversal questions.

During the course of the 1978 Senatorial campaign, a newspaper story reported "court records show that Williams was three times charged with violations of federal regulations covering commodities and security investment counselors." The Defendant had seen this publicity and had no reason to believe the account to be untrue.

In the fall of 1979, state and national candidates from both parties began to actively pursue primary nominations. As a part of that activity, the Republican Party launched a salvo against the potential contenders for the Democratic nomination for Superintendent of Public Instruction, one of the five statewide elected officers in the executive branch of Montana government. In response to this political

attack, Respondent Pasma, an active member of the Democratic Party, issued a press release critizing the Republicans for interfering in Democratic primaries and suggesting that they should, instead, launder their own political organizations. The Respondent cited as an example, the recently announced Connally for President campaign organization in Montana headed by former governor Tim Babcock (who had been indicted for illegal contributions to the Nixon presidential campaign) and Petitioner, Williams, who had been charged with violations of regulations covering commodities and security investment counselors. The Petitioner used the term "indictment" rather than "charged" in his censure of the three Republicans.

The Petitioner brought a libel action claiming that he had never been "indicted,"

was a private individual and no constitutional protections were afforded Respondent as to his claim. After completion of discovery, the Respondent moved for summary judgment claiming that the Petitioner was a "public figure" and there was no evidentiary basis to suggest or conclude that the statements were made with actual malice. The trial court determined there to be no genuine or material issue of fact with respect to Williams' status as a public figure and proceeded to search the record for any evidence of malice. Finding none, the court concluded there was no evidentiary basis upon which the jury could conclude the statements were made with malice and entered judgment on both issues in favor of the Respondent. The Plaintiff appealed, raising issues similar to

those cited in his Petition, here, and the Supreme Court rejected those arguments in affirming summary judgment.

SUMMARY OF ARGUMENT

It is Respondent's position that the Montana Supreme Court decision is entirely consistent with applicable decisions of this Court and there is no reason for a review on certiorari of the ruling, below.

Utilizing precedent set down by this Court, the Montana Courts concluded that in the several years preceding the alleged libel, the Petitioner voluntarily participated in public and political activities which propelled him to the forefront of his political party. Indeed, these achievements merited his designation as John Connally's campaign chairman in Montana. By virtue of these activities, Petitioner

had significant access to the channels of effective communication and, by his own admission, readily utilized the media in promoting his political beliefs. The Court below correctly denominated the Petitioner a public figure for all purposes.

Even if the Supreme Court had chosen to consider the Petitioner a public figure for the purpose of the controversy into which he had injected himself, to-wit, the Connally for President campaign, such voluntary act ran him the risk of closer public scrutiny. Concomitant with vested political leadership, goes Petitioner's credibility and character. In agreeing to lend his name and influence to the presidential campaign, the Petitioner assumed the risk of closer public scrutiny. Respondent's comment was certainly

part of the entire political controversy involving the credence of John Connally and the people chosen to lead his campaign. It simply cannot be said that the comments giving rise to the alleged libel did not arise out of the public controversy which precipitated the remarks.

Finally, there is no legitimate basis for distinguishing between the standards applicable to media and non-media defendants in public figure libel cases under the freedom of speech. Even if one were to assume that freedom of speech and press are not synonymous, there is no basis in the plain language of the First Amendment that would justify according greater protection to the media than to private individuals. Therefore, the Montana Supreme Court was correct in applying the constitu-

tional standard requiring malice to be established by clear and convincing evidence to this "non-media" defendant.

REASONS FOR DENYING THE WRIT

1. PETITIONER IS A "PUBLIC FIGURE" FOR PURPOSE OF APPLYING THE NEW YORK TIMES MALICE STANDARD

The Montana Supreme Court, below, adopted this Court's ruling in New York Times v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964) that clear and convincing evidence of actual malice be shown when a public official sues a media defendent for libel. Since the Petitioner was not an elected or appointed governmental official, the Montana courts looked to Gertz v. Robert Welch, Inc., 418 U.S. 323, 94 S.Ct. 2997, 41 L.Ed.2d 789 (1974) wherein this Court defined two types of "public figures." First, individuals who through fame and notoriety

are public figures for all purposes. Secondly, and more commonly, there are individuals who inject themselves or are drawn into a particular controversy and thereby become public figures for a limited range of issues. "Such persons assume special prominence in the resolution of public questions." Id at 351, 94 S.Ct. at 3013, 41 L.Ed.2d at 812. "In either event, they invite attention and comment." Id at 345, 94 S.Ct. 3009, 41 L.Ed.2d at 808.

In Wolston v. Reader's Digest Assoc., Inc., 443 U.S. 157, 61 L.Ed.2d 450, 99 S.Ct. 2701 (1979), the majority characterized the ruling in Gertz as follows:

> We identify two ways in which a person may become a public figure for purposes of the first amendment:
>
> 'For the most part those who attain this status have assumed rules roles of especial prominence in the affairs of society. Some occupy

> positions of such persuasive power and influence that they are deemed public figures for all purposes.
>
> More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. 418 U.S. at 345, 94 S.Ct. 2997, 41 L.Ed.2d 789.'

Wolston, 443 U.S. at 164, 61 L.Ed.2d at 458

Obviously, frequency of public exposure is a substantial element in the formula by which one assumes a role of "especial prominence in the affairs of society." However, an examination of this Court's rulings in Hutchinson v. Proxmire, 443 U.S. 111, 99 S.Ct. 2675, 61 L.Ed.2d 411, (1979) and Wolston, supra, reveals an underlying factor upon which a public figure determination ultimately turns. After discussing the media access rationale in Wolston, Mr. Justice Rehnquist articulates:

> Second, and more importantly, was a normative consideration that public figures are less deserving of protection than private persons because public figures like public officials, have "voluntarily exposed themselves to increased risk of injury from defamatory falsehoods concerning them." (Citing Gertz, 418 U.S. at 345)

Hutchinson, 443 U.S. at 164, 61 L.Ed.2d at 458.

Here, unlike Ronald Hutchinson and Ilya Wolston, Larry Williams successfully propelled himself to the forefront of Montana politics moving from a virtual unknown to a political leader in a little less than two years. In doing so, he invited the risk of negative comment about his character and background. He became, in the manner prescribed by Gertz, a public figure for purposes of the First Amendment.

This Court applied the same logic in characterizing a Senatorial candidate as a public figure in Monitor Patriot

Co. v. Roy, 401 U.S. 265, 91 S.Ct. 621, 28 L.Ed.2d 35 (1971).

A subsidiary issue is raised by Petitioner with respect to the "community" referenced in Gertz:

> Absent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life. 418 U.S. at 352.

The Montana Court construed the word "community" to mean the "Montana community." Respondent agrees with the Montana Court's conclusion that the relevant community is Montana. Certainly, the community is circumscribed by the Petitioner's political involvement and it was in that same arena that the publication of the alleged libel occurred. The distinction drawn by Petitioner is therefore meaningless in the context of this case.

2. PETITIONER FAILED TO PRESENT A GENUINE ISSUE OF MALICE

The rule of New York Times v. Sullivan imposes a constitutional protection and prohibition against recovery by public officials or public figures for defamatory falsehood unless it can be established with convincing clarity that the statement was made with actual malice, that is "knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80. The touchstone of malice in this specialized sense is knowledge. The libel defendant must either have published with a "high degree of awareness of probable falsity" [Garrison v. Louisiana, 379 U.S. 64, 74, 85 S.Ct. 209, 13 L.Ed.2d 125 (1967)] or "in fact entertained serious doubts as to the truth of his publication" [St. Amant v. Thompson, 390 U.S. 727, 731, 88 S.Ct. 1323,

20 L.Ed.2d 262 (1968)].

The Respondent argued below that unless the evidence adduced during discovery demonstrates that Plaintiff had some evidentiary basis for an actual malice determination by clear and convincing proof, summary judgment for Respondent must be granted under Montana law. This assertion was raised at the outset of the suit and was urged throughout discovery. At no time did Petitioner provide any evidence that Respondent had actual knowledge or entertained any serious doubts as to the accuracy of the news report of Petitioner's difficulties with the Securities and Exchange Commission. Nevertheless, Petitioner argues that summary disposition of the malice issue is inappropriate because it involves Respondent's subjective feelings and

those feelings must suffer the scrutiny of a jury.

Respondent here submits that a plaintiff is not entitled to continue litigation in the mere hope of putting Respondent's credibility at issue without producing some evidence establishing that the Respondent might in fact have entertained serious doubts concerning the truth of his statements. There must be some presentation of objective facts on which awareness or knowledge could be premised.

To the date of his Petition, Petitioner has yet to identify any factual basis which would support a verdict that Respondent knew or had a high degree of awareness that Larry Williams had not been "indicted" by the federal government. Indeed, it was not until this lawsuit was commenced that

Respondent was made aware of the legal distinction between "indictment" and "charged." The Montana courts simply refused to hold Respondent retroactively liable for his failure as a lay person to make this distinction.

3. THERE IS NO CONSTITUTIONAL BASIS FOR DISTINGUISHING AND NOT APPLYING NEW YORK TIMES IN LIBEL CASES INVOLVING NON-MEDIA DEFENDANTS

Respondent here acknowledges the author of the majority opinion in Hutchinson v. Proxmire, supra, observed that this Court has never decided whether New York Times applies to non-media defendants. (443 U.S. 111, 133, N. 16, 99 S.Ct. 2675, 2687, N. 16, 16 L.Ed.2d 411).

Petitioner's characterization of this footnote is that the Court "has reserved the question of whether the First Amendment restrictions apply to non-media defendants." (Petition,

page 19.) Certainly, an acknowledgement that the question has not been decided does not constitute a "reservation" of the issue.

Although this Court has not directly confronted the issue, it has on several occasions applied the New York Times rule in cases involving non-media defendants. See Garrison v. Louisiana, supra, Henry v. Collins, 380 U.S. 356, 85 S.Ct. 992, 13 L.Ed.2d 892 (1965) and St. Amant v. Thompson, supra.

In any event, state courts have confront the issue and had little difficulty applying New York Times without differentiating between media and non-media defendants. See Grad v. Copeland, 280 S.2d 461, 462 (Florida District Court of Appeals), cert.den., 287 S.2d 682 (Florida); Gibson v. Maloney, 263 S.2d 632, 636, cert.den., 268 S.2d 909

(Florida 1972), cert.den., 410 U.S. 984, 93 S.Ct. 1505, 36 L.Ed.2d 180, (1973); Hirman v. Rogers, 257 N.W.2d 563, 566 (Minn. 1977); Wollman v. Graff, 287 N.W.2d 104, 107 (S.D. 1980).

As the Supreme Court of Maryland noted in Jacron Sales Co. Inc., v. Sindorf, 276 Maryland 580, 350 A.2d 688, 696 (1976) the common law of defamation, apart from the relatively recent injection of constitutional considerations is renowned for its complexity. If the courts apply the same rules of defamation to media and non-media defendants, the complexity can be decreased and the courts can move toward consistency and simplicity in the law of defamation.

The Restatement (Second) of Torts, Section 580 (b) and (e), pages 230 and 231, and Section 592(a), special note, pages 259-260 (1977), has "codified"

the general resolution of this issue by the lower courts:

> . . . the protection of the first amendment extends to freedom of speech as well as to freedom of the press, and the interest that must be balanced to obtain a proper accommodation are similar. It would seem strange to hold that the press, composed of professionals and causing much greater damage because of the wider distribution of the communication, can constitutionally be held liable only for negligence, but that a private person, engaged in a casual private conversation with a single person, can be held liable at his peril if the statement turns out to be false, without any regard to his lack of fault.

Finally, it is clear that this Court is uniquely disinterested in resolving the issue, insofar as it routinely denies certiorari in cases presenting the identical issue here. Indeed, in this most recent term of the Court, certiorari has been

denied in Mertz v. Denny, No. 81-2376, 51 U.S.L.W. 3258 and Anderson v. Low Rent Housing Commission, No. 81-714, 50 U.S.L.W. 344. In Mertz, the Court was asked by a defendant to review a Wisconsin Supreme Court ruling that New York Times does not apply to a non-media defendant. In Anderson, the Court was asked to review an Iowa Supreme Court ruling that New York Times does apply to a non-media defendant. This Court denied certiorari in each of those cases. Certainly, this case does not present a dissimiliar policy issue and Respondent submits that it should be resolved similarily.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition

for Writ of Certiorari should be denied.

Respectfully submitted,

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